IN THE

SUPREME COURT OF THE UNITED STATES

MAR 5 1975
JOHN, JR., CLERK

OCTOBER TERM, 1974

* * *

NO. 74-1103

* * *

W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

V.

BILLY LEE JOHNSON,

Respondent

* * *

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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PETITION FOR WRIT OF CERTIORARI
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* * *

Petitioner W. J. Estelle, Jr. respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on January 9, 1975.

OPINION BELOW

The opinion issued by the Fifth Circuit in

this case is as yet unreported and is printed as Appendix A in the separately bound Appendix to this petition. The judgment entered by the Fifth Circuit is printed as Appendix B.

## JURISDICTION

The Supreme Court has jurisdiction of this case by virtue of 28 U.S.C. Section 1254(1). The judgment of the Fifth Circuit was entered on January 9, 1975.

## QUESTION PRESENTED

Did the Fifth Circuit improperly impose the burden of proof on the state in determining whether respondent Johnson's state court conviction for assault with intent to commit rape violated his fifth amendment right not to be subjected to double jeopardy?

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

The Fourteenth Amendment to the Constitution provides:

> . . . nor shall any State deprive

burglary was a controverted issue at his first trial, Johnson has not demonstrated that the second trial subjected him to double jeopardy.

The Fifth Circuit, however, concluded that the state had subjected Johnson to double jeopardy when it tried him the second time and accordingly ordered that his petition for habeas relief be granted. It reached this conclusion primarily because it erroneously treated the case as though the state had the burden of proof. The Fifth Circuit's approach to the case is graphically illustrated by the following passage from its opinion:

> In the present case we find that no rational jury could have acquitted on the basis of the different "issues" presented in the first trial, absent a defendant's reliance on those factors.[1] The State cannot produce a record here showing such reliance.[2] The State's suggested bases for acquittal in the first trial are nothing more than the sheerest speculation.

Johnson v. Estelle, ___ F.2d 2275, 2281 (No. 73-3945, 5th Cir., January 9, 1975) (emphasis added).

The quoted passage plainly demonstrates that the Fifth Circuit approached the case as though the state had the burden of proving that in the first trial Johnson based his defense on an issue not present in the second trial. Since there was no evidence in the record which indicated what

Johnson's defense was at the first trial, the Fifth Circuit ruled that the state had not carried its burden:

> There is no available testimony offering a scintilla of evidence that defendant might have come into the Crandall house without breaking, and the judge's charge to the jury gave an expansive definition of breaking. No rational jury could have acquitted, on the grounds that defendant did not break into the home, on the basis of what we have before us.

Johnson, supra at 2282.

But the dearth of evidence as to what transpired at the first trial should not have prejudiced the state. As petitioner, Johnson had the burden of proof. It was his responsibility to demonstrate affirmatively that no issue was controverted in the first trial which was not also present in the second. In order to obtain habeas relief, he was required to prove that no rational jury could have acquitted him in his first trial on the ground that he did not break into Mrs. Crandall's residence. If the Fifth Circuit had applied the correct rule as to burden of proof, an opposite conclusion would have been reached, and Johnson's petition would have been denied. The Fifth Circuit grievously erred when it treated this case as though the state had the burden of proof.

By imposing the burden of proof on the

ed man, a member of the Negro race. She testified that colored people lived around her. She testified that she went back in to where the T.V. was, and the next thing she knew the man appeared, or a man appeared and had a knife and grabbed her by the shoulders. She ran for the phone and tried to call the police or dial the operator, and he grabbed her by the shoulders, dragged her all over the house, turned off the T.V., tore off her dress, threw her down on the front of the couch and was trying to assault her; that she was thrown to the floor, her clothes were torn; that he said that, "I am going to assault you and kill you and take all your money". He also said that he was going to rape her. About that time she testified there was a bright light thrown on the house and that she screamed, "O God, he is going to kill me", and she resisted him as best she could; that he was trying to have intercourse with her without her consent; that she was a female person, a woman; that his assault on her and his attempts to have carnal knowledge and intercourse with her was against her will; that she could not identify the man who was in the house, who was committing the assault upon her.

> On cross examination she testified that she had the clothing that she had worn at the time of the assault; that the police came out and investigated the case".

The stipulated testimony of the police officer was:

> "If Officer W. T. Mikel were present in court and sworn as a witness, he would testify that he is a member of the Dallas Police Department assigned to the Radio Patrol Division with particular specialty of the Canine Corps, and he worked in that capacity on February 4 and 5, 1967 when, with a police dog named Rex, at about 9:45 p.m., he was near 1403 South Fitzhugh and heard a woman scream. He could not determine where the screams were coming from, but he did stop his police car and got out and determined that the screams were coming from the house at 1403 South Fitzhugh. He could hear a woman screaming, "Help, you are killing me," or words to that effect. He testified that he went to the front door of the house and that he was let in by a woman whom he identified as Mrs. Corah Bell Crandell; that her clothes were torn; that she said something to the effect, "He is going

> out the back door", and he ran around to the back door and saw a man whom he identified in court as the Defendant coming out the back door or on the back porch of Mrs. Crandell's house; that he hollered for him to stop; that thereafter he shot him two or three times and the Defendant was badly wounded and he remained there at the scene until he was removed by the ambulance".

After considering the foregoing stipulations and the arguments of Johnson's attorney, the state trial court denied the motion to quash, and the second trial began. Johnson was convicted, and he appealed. On appeal he argued that the second trial caused him to be placed in jeopardy twice for the same offense. This contention was rejected by the Texas Court of Criminal Appeals, Johnson v. State, 432 S.W.2d 98 (Tex.Crim.App. 1968), and the conviction was affirmed.

Subsequently, Johnson filed several petitions for writ of habeas corpus in the state courts always raising his double jeopardy claim. In each case the contention was rejected. See Ex Parte Johnson, 472 S.W.2d 156 (Tex.Crim.App. 1971), printed as Exihibit D to this petition, in which the Texas Court of Criminal Appeals reconsidered the double jeopardy question in light of the Supreme Court's decisions in Benton v. Maryland, 395 U.S. 784 (1969), and Ashe v. Swenson, 397 U.S. 436 (1970).

Finally, Johnson filed the present petition for writ of habeas corpus in the United States District Court for the Northern District of Texas. When that Court denied relief, an appeal was taken to the United States Court of Appeals for the Fifth Circuit. A panel of the Fifth Circuit decided that the second prosecution of Johnson subjected him to double jeopardy and therefore violated his fifth amendment rights. The Court reasoned that in order to convict Johnson in the second trial on a charge of assault with intent to commit rape the state had to obtain favorable jury findings on issues already found against it, and in Johnson's favor, in the first trial. The Court recognized that a defendant charged with burglary of a private residence at nighttime with intent to commit rape might have based his defense on quite different legal issues from those relied upon by a defendant charged with assault with intent to commit rape. However, the court ruled that in Johnson's case the same issues must have been present in both trials. The court reached this conclusion primarily because the state was unable to produce a record demonstrating that in the first trial Johnson had raised issues different from those present in the second trial. As a result of the court's ruling, the state has been ordered to release Johnson from its custody. However, the court has stayed its mandate to and including March 5, 1975; the stay is printed as Appendix C in the separately bound Appendix. This petition has been filed to bring the Fifth Circuit decision before the Supreme Court for review.

## REASON FOR GRANTING THE WRIT

### In Resolving The Double Jeopardy Question Present In This Case The Fifth Circuit Improperly Imposed The Burden Of Proof On The State.

A fundamental rule applicable in habeas corpus proceedings is that a judgment of conviction must be presumed to have been reached in accordance with due process until otherwise shown. Johnson v. Zerbst, 304 U.S. 458, 468 (1938). Justice Frankfurter delivered the leading statement of this rule in his opinion in Adams v. United States, 317 U.S. 269, 281 (1942):

> If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.

Thus the burden of proof in a habeas corpus proceeding is on the petitioner. This rule is well-established and has been followed by the federal appellate courts on numerous occasions. See, e.g., Swain v. Alabama, 380 U.S. 202 (1965), Stroble v. California, 343 U.S. 181 (1952), Webster v. Estelle, ___ F.2d ___, (No. 74-2316, 5th Cir., Dec. 26, 1974), Williams v. Estelle, 500 F.2d 206 (5th Cir. 1974), United States v. Branan, 457 F.2d 1062 (6th

Cir. 1972), and United States ex rel. Castillo v. Fay, 350 F.2d 400 (2nd Cir. 1965). Yet in the instant case the Fifth Circuit inexplicably chose to ignore the rule and instead treated the case as though the burden of proof rested with the state.

In his habeas application respondent Johnson contended that his conviction on the charge of assault with intent to commit rape was constitutionally infirm because it was obtained in violation of his fifth amendment right not to be subjected to double jeopardy. He relied principally upon the Supreme Court's decision in Ashe v. Swenson, 397 U.S. 436 (1970). In Ashe the court held that the doctrine of "collateral estoppel" is embodied in the fifth amendment guarantee against double jeopardy and means simply that once an issue of ultimate fact has been determined in a defendant's favor by a valid and final judgment the defendant cannot be required to relitigate that issue in any future trial.

Johnson argued that at his initial trial on the charge of burglary of a private residence at nighttime with intent to commit rape two issues of fact were in dispute. One was the identity of Mrs. Crandall's assailant, and the other was the intention of that assailant to commit rape. Johnson contended that when the first jury acquitted him, it must have found one or the other of these issues in his favor. As a result, the double jeopardy clause foreclosed one of the two from consideration in the second trial. Since in order to convict Johnson at the second trial on the charge of assault with intent to commit rape it was necessary

for the state to obtain favorable findings on both the issue of identity and the issue of intention, the state was at the outset collaterally estopped from bringing the action.

The state met Johnson's argument by pointing out that the essential elements to be proved in a case of burglary of a private residence at nighttime with intent to commit rape are not entirely the same as those that must be proved when the charge is assault with intent to commit rape. A rational jury could have based its decision to acquit Johnson in the first trial on the state's failure to establish essential elements not in controversy in the second trial. If this in fact happened, then the second trial could proceed without subjecting Johnson to double jeopardy.

For instance, in order to convict on a charge of burglary of a private residence at nighttime with intent to commit rape, the state must prove that the defendant entered the residence in question without its occupant's consent. This issue is immaterial in a case of assault with intent to commit rape. If there is a reasonable possibility that the jury which acquitted Johnson in the first trial based its conclusion on the fact that Johnson did not break into Mrs. Crandall's residence, then the double jeopardy clause would not preclude the state from bringing Johnson to trial a second time on a charge of assault with intent to commit rape.

The basic issue in this habeas corpus proceeding, then, was whether there were any controverted issues in the first trial on the basis of which

rational jurors could have acquitted Johnson which were not present in the second trial. As an applicant for habeas relief, Johnson had the burden of proof. It was his responsibility to demonstrate that the only issues controverted at the first trial were ones necessarily present in the second and that no rational jury could possibly have based its acquittal of him on an issue not present in the second trial. In denying relief, the district court in effect ruled that petitioner Johnson failed to carry his burden.

There is no evidence in the record of this proceeding upon which a contrary conclusion could be based. At the first trial Johnson was charged with burglary of a private residence at nighttime with intent to commit rape. He might have defended himself on the theory that there was no burglary because he entered Mrs. Crandall's residence with her consent. As long as there is a possibility that the burglary issue was controverted at Johnson's first trial and formed the basis of his acquittal, then the state would not be precluded by the double jeopardy clause from trying him again on a charge of assault with intent to commit rape.

Johnson has presented no evidence which adequately refutes this possibility. There is no record of the proceedings at the first trial. The stipulations submitted into evidence in this proceeding only indicate the nature of Mrs. Crandall's and the arresting officer's testimony; they do not indicate whether Johnson testified or what his defense might have been. Until he has presented substantial evidence refuting the possibility that

any person of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

In May of 1967 respondent Billy Lee Johnson was tried in Criminal District Court No. 5 of Dallas County, Texas on a charge of "burglary of a private residence at nighttime with intent to commit rape." He was found not guilty by a jury. The record of what occurred at this trial is rather limited. A trial transcript is not available for use in determining what evidence was presented and what legal issues were raised. A record of the instructions given by the judge is available.

Five months after the first trial ended in acquittal, Johnson was again brought to trial but this time on a charge of "assault with intent to commit rape." The charge upon which the second trial was based stemmed from the same incident as the charge in the first trial. Before the second trial commenced, Johnson filed a motion to quash the indictment on the ground that a second prosecution was barred by the double jeopardy provision of the fifth amendment. In support of this motion, Johnson produced stipulations, agreed upon by his counsel and the prosecuting attorney, as to the testimony given by the complaining witness and the arresting officer at the first trial.

The stipulation with respect to the testimony of the complaining witness, Mrs. Crandall, reads as follows:

"That if the witness, Mrs. Corah

Bell Crandell, were present in Court, she would testify that on May 22, 1967 in the Criminal Court Room Number Five of Dallas County, Texas that she appeared as a witness in Cause Number 67-1034-JL, styled State of Texas Vs. Billy Lee Johnson, which said case was a case charging Billy Lee Johnson with burglary of a private residence at nighttime with intent to commit rape, and after being sworn as a witness in that case, she testified on direct examination that she was eighty-two (82) years of age, that she lived then at the time she testified at 1403 South Fitzhugh, and had lived there for forty (40) years; that on February 4, 1967, she was living there and she had lived and resided in a residence there in a house which had four (4) walls, a ceiling, floor, doors and windows; that about 9:45 that evening she was at home at that location at 1403 South Fitzhugh, and she was watching television when she heard someone at the back side of the house; that she went to the door and saw a man there who said that he wanted to see about buying a car that she had for sale. She testified that she told him that she did not have any car for sale. She identified the man as being a color-

state, the Fifth Circuit has effectively nullified the state adjudicatory process. It has presumed that petitioner Johnson's constitutional rights were violated during the state criminal proceedings. While the federal courts have always been ready to correct constitutional deficiencies appearing in state criminal proceedings, they have never gone so far as to presume unconstitutionality. The party seeking federal habeas relief has always had the burden of demonstrating that his constitutional rights were violated. This well-established principle has been forgotten by the Fifth Circuit in this case. The Supreme Court should grant this petition for writ of certiorari so that it can correct the Fifth Circuit's error in imposing the burden of proof on the state in this federal habeas proceeding.

## CONCLUSION

For the foregoing reasons, a petition for writ of certiorari should be granted. Petitioner prays that the holding below be reversed and that respondent Johnson's application for writ of habeas corpus be denied.

Respectfully submitted,

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Attorney General of Texas

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First Assistant

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Chief, Enforcement Division

GEORGE R. BEDELL
Assistant Attorney General

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Assistant Attorney General

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P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Dunklin Sullivan, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been served by placing the same in the United States Mail, postage prepaid, certified, on this the ____ day of March, 1975, addressed as follows: Mr. Ted Reddington, Staff Counsel for Inmates, Texas Department of Corrections, Huntsville, Texas 77340.

DUNKLIN SULLIVAN
Assistant Attorney General

SUPREME COURT, U. S.

74-1103

FILED
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MICHAEL RODAK, JR., CLERK

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

* * *

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# A P P E N D I X  "A"

**Billy Lee JOHNSON, Petitioner-Appellant.**

**v.**

**W. J. ESTELLE, Director, Texas Department of Corrections, Respondent-Appellee.**

No. 73-3945.

**United States Court of Appeals, Fifth Circuit.**

Jan. 9, 1975.

After having been tried and found not guilty of the crime of burglary of a private residence at nighttime with intent to commit rape, defendant was later convicted in a state court of assault with intent to commit rape on charges stemming from the same incident. The United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, Jr., Chief Judge, denied defendant's subsequent petition for habeas corpus, and defendant appealed. The Court of Appeals, Goldberg, Circuit Judge, held that where it appeared that no rational jury could have acquitted defendant in his first trial on issues other than the identity of the assailant and the absence of intent to rape, retrial of defendant on the second charge resulted in his being subjected to double jeopardy.

Writ granted.

**1. Criminal Law ⇐195(1)**

Application of rule that collateral estoppel is part of Fifth Amendment double jeopardy prohibition depends upon whether some issue necessary for prosecution's case in second trial has necessarily been found for defendant in first trial. U.S.C.A.Const. Amends. 5, 14.

Synopses, Syllabi and Key Number Classification
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INDEXED

**2. Judgment ⇐751**

Where determination of innocence on one of two issues was cause of acquittal and determination of guilt on both issues is necessary for subsequent conviction, State is estopped from bringing second action. U.S.C.A.Const. Amend. 5.

**3. Criminal Law ⇐200(7)**

Where defendant was first found not guilty of crime of burglary of private residence at nighttime with intent to commit rape on a 82-year-old victim and was later retried and convicted on charges of assault with intent to commit rape, which charges stemmed from same incident, second trial resulted in defendant's being subjected to double jeopardy, since, absent showing of reliance by defendant in first trial on issues such as whether there was breaking, whether initial intent was one of theft rather than rape, or whether site of alleged crime was private residence, rational jury could have based its decision in first trial only on negative findings on issues of identity of assailant or intent to rape, as to both of which issues collateral estoppel applied in second trial. Vernon's Ann.Tex.P.C. art. 1391; U.S.C.A.Const. Amends. 5, 14.

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Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, GODBOLD and MORGAN, Circuit Judges.

GOLDBERG, Circuit Judge:

This case presents a good illustration of the perils of double jeopardy. On May 23, 1967 Billy Lee Johnson was found not guilty of the crime of "burglary of a private residence at nightime with intent to commit rape." Five months later he was convicted of "assault with intent to commit rape," on charges stemming from the same incident for which he was acquitted in his first trial. He was sentenced to 99 years in jail.

His conviction was upheld on direct appeal, Johnson v. State, Tex.Cr.App.1968, 432 S.W.2d 98, and his subsequent petitions for a writ of habeas corpus were denied in State and federal district courts. He appeals to this Court for his writ. Today we find that the issues presented in the second trial substantially duplicated those presented in the first trial. We cannot conclude that a rational jury would have acquitted or convicted defendant on the basis of the differences between the proof necessary to substantiate each indictment.

Unfortunately, our knowledge of the facts and the legal issues presented to the jury in the first case is limited. This Court was advised, after it had received no transcript from the first proceeding, "that no further transcripts are available in the above-styled cause". Letter to the Court, Sept. 25, 1974, from District Court for Northern District of Texas. Our knowledge of the testimony at the first trial is limited to stipulations between defense attorney and prosecutor about the testimony of the prosecuting witness and the police officer who conducted the initial investigation.

Those stipulations are:

"That if the witness, Mrs. Corah Bell Crandell, were present in Court, she would testify that on May 22, 1967 in the Criminal Court Room Number Five of Dallas County, Texas that she appeared as a witness in Cause Number 67–1034–JL, styled State of Texas Vs. Billy Lee Johnson, which said case was a case charging Billy Lee Johnson with burglary of a private residence at nighttime with intent to commit rape, and after being sworn as a witness in that case, she testified on direct examination that she was eighty-two (82) years of age, that she lived then at the time she testified at 1403 South Fitzhugh, and had lived there for forty (40) years; that on February 4, 1967, she was living there and she had lived and resided in a residence there in a house which had four (4) walls, a ceiling, floor, doors and windows; that about 9:45 that evening she was at home at that location at

1403 South Fitzhugh, and she was watching television when she heard someone at the back side of the house; that she went to the door and saw a man there who said that he wanted to see about buying a car that she had for sale. She testified that she told him that she did not have any car for sale. She identified the man as being a colored man, a member of the Negro race. She testified that colored people lived around her. She testified that she went back in to where the T.V. was, and the next thing she knew the man appeared, or a man appeared and had a knife and grabbed her by the shoulders. She ran for the phone and tried to call the police or dial the operator, and he grabbed her by the shoulders, dragged her all over the house, turned off the T.V., tore off her dress, threw her down on the front of the couch and was trying to assault her; that she was thrown to the floor, her clothes were torn; that he said that, "I am going to assault you and kill you and take all your money". He also said that he was going to rape her. About that time she testified there was a bright light thrown on the house and that she screamed, "O God, he is going to kill me", and she resisted him as best she could; that he was trying to have intercourse with her without her consent; that she was a female person, a woman; that his assault on her and his attempts to have carnal knowledge and intercourse with her was without her consent and against her will; that she could not identify the man who was in the house, who was committing the assault upon her. On cross examination she testified that she had the clothing that she had worn at the time of the assault; that the police came out and investigated the case".[4]

The stipulated testimony of the police officer was:

"If Officer W. T. Mikel were present in court and sworn as a witness, he would testify that he is a member of the Dallas Police Department assigned to the Radio Patrol Division with particular specialty of the Canine Corps, and

he worked in that capacity on February 4 and 5, 1967 when, with a police dog named Rex, at about 9:45 p. m., he was near 1403 South Fitzhugh and heard a woman scream. He could not determine where the screams were coming from, but he did stop his police car and got out and determined that the screams were coming from the house at 1403 South Fitzhugh. He could hear a woman screaming, "Help, you are killing me," or words to that effect. He testified that he went to the front door of the house and that he was let in by a woman whom he identified as Mrs. Corah Bell Crandell; that her clothes were torn; that she said something to the effect, "He is going out the back door", and he ran around to the back door and saw a man whom he identified in court as the Defendant coming out the back door or on the back porch of Mrs. Crandell's house; that he hollered for him to stop; that thereafter he shot him two or three times and the Defendant was badly wounded and he remained there at the scene until he was removed by the ambulance".

We also have a transcript of the instruction which the judge gave the jury in this first case. We will refer to it below as it elucidates particular points.

I.

In Benton v. Maryland, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707, the Supreme Court held that the Fifth Amendment guarantee against double jeopardy was enforcible against the states through the Fourteenth Amendment. The following term, the Court held that collateral estoppel is part of the Fifth Amendment double jeopardy prohibition. Ashe v. Swenson, 1970, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443, 90 S.Ct. at 1194, 25 L.Ed.2d at 475. The Court

in *Ashe* went on to say that where the jury in the first trial had returned a general verdict, a court reviewing for duplication of issues must:

> [E]xamine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

397 U.S. at 444, 90 S.Ct. at 1194, 23 L.Ed.2d at 475–476, *quoting* Mayers & Yarborough, Bis Vexari: New Trials and Successive Prosecutions, 1960, 74 Harv.L.Rev. 1, 38–39.

Ashe was acquitted in his first trial of robbery of one of the players in a poker game. He was then tried and convicted for robbing another player in the game. Since the only controverted issue in each trial was the identity of the robber, the Court held that the second trial, by requiring relitigation, had put the defendant in double jeopardy.

As noted by the United States Magistrate in the present case, there are two issues upon which the jury in the first trial could have based its acquittal, which were controverted in the second trial. One was the identity of Mrs. Crandall's assailant and the other was the intention of that assailant to commit rape. The State argues that *Ashe* applies only where one issue is in question in both trials.

[1, 2] We disagree with the State. Application of the rule depends upon whether some issue necessary for the prosecution's case in the second trial has necessarily been found for the defendant in the first trial. *See* Sealfon v. United States, 1948, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180. Thus the fact that either identity or intent could have been the basis for the first jury's decision does not foreclose the application of Ashe v. Swenson, because *both* factors would have to be proven in order to convict at the second trial. Where a determination of innocence on one of two issues was the cause of an acquittal

and a determination of guilt on *both* issues is necessary for a subsequent conviction, the State is estopped from bringing the action.

II.

[3] The State contends, however, that a "rational jury" could have based its decision in the first trial on the State's failure to establish essential elements not in controversy in the second trial. If this is in fact the case, then the double jeopardy criterion would, of course, not apply.

In the present case we find that no rational jury could have acquitted on the basis of the different "issues" presented in the first trial, absent a defendant's reliance on those factors.[1] The State cannot produce a record here showing such reliance.[2] The State's suggested bases for acquittal in the first trial are nothing more than the sheerest speculation.

There are three components of a "burglary of a private residence at nighttime with intent to commit rape" charge which are not involved in an "assault with intent to commit rape" charge and upon which the State believes the jury in the first trial could have based its verdict of acquittal. They are: "[(1)] the Petitioner entered the house without breaking; (2) that he entered by breaking with intent to commit theft but that the intent to commit rape was later formed; (3) that

1. We keep in mind the warning given in the same article that the Supreme Court quoted from in *Ashe:*

> It is probable that in the large majority of criminal prosecutions the defendant will litigate only one issue. For example, he will present an alibi, plead a lack of requisite criminal intent, or deny that the act was perpetrated at all. If a latter court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering.

Mayers & Yarbrough, 74 Harv.L.Rev. at 37–38.

2. There is no suggestion that the lack of a record owes in any way to the fault of petitioner Johnson or his counsel, so we need not consider whether showing of such fault would raise any hostile presumption.

there was insufficient evidence that the site of the alleged crime was a private residence." Appellee's Brief at 6.

We address ourselves to each issue, in order. 1) Petitioner entered without breaking.

That this is an improbable jury rationale is evident from the trial court's jury instruction in the first trial:

> By the term "entry" into a house is meant every kind of entry but one made by free consent of the occupant, or of one authorized to give such consent.
>
> By the term breaking is meant that the entry must be made with actual force. The slightest force, however, is sufficient to constitute breaking, such as lifting a latch of a door that is shut or pulling or pushing open a door.[3]

There is no available testimony offering a scintilla of evidence that defendant might have come into the Crandall home without breaking, and the judge's charge to the jury gave an expansive definition of breaking. No rational jury could have acquitted, on the grounds that defendant did not break into the home, on the basis of what we have before us.

The State's second alternative, that the jury may have doubted that the requisite intent existed at the moment of entry, is equally implausible. With not a speck of factual foundation the State speculates that the jury may have believed that Johnson entered the Crandall house with another purpose, such as burglary, but that, upon casting his eyes on this eighty-two year old woman he was suddenly overcome with a passion which caused him to change his intention.

3. Nor was there room for interpretation of the meaning of "breaking" by defense counsel. The Texas courts have long held that opening a shut door is an entry by force which constitutes breaking. *See, e. g.*, Mixon v. State, Tex.Cr.App.1966, 401 S.W.2d 806.
It is worthy of note that appellant contends in his brief, and the State does not deny, that among the items of evidence submitted in the first trial, and resubmitted in the second, was a picture of a screen door cut open.

The judge's instruction to the jury would not alert it to a special concern over the moment when defendant formed his intention. The judge's instructions on this score were:

You are instructed that the offense of burglary of a private residence in the nighttime with intent to commit rape, is constituted by entering a house, that is, a private residence, by force, threats or fraud, at night, or in any manner by entering a private residence at any time, by either day or night, and remaining concealed therein until night, with the intent of committing the offense of rape. The charge in this case is the entry into a private residence, at night, by force, with the intent to commit rape. The punishment is by confinement in the Texas Department of Corrections for any term of years not less than five. . . . [b]efore you would be warranted in finding a verdict of guilty, you must find from the evidence, beyond a reasonable doubt, that the entry was made in the nighttime, and with the intent to commit the crime of rape.

While the judge gave individual definitions of many of the terms in the charge he did not specifically draw attention to the proposition that the intention must be in the mind of the burglar at the time of entry.[4]

We do not believe that any rational jury, *sua sponte*, could have been moved to acquit defendant on the grounds that his intention turned from robbery to rape in midflight from the threshold to Mrs. Crandall.

Finally, the State argues that the jury could rationally have doubted that the alleged incident transpired in a "private

4. Texas courts have not put the burden on the prosecutor to show the nature of the intention at the exact moment of breaking, but have upheld convictions where intention has been read, *post hoc*, from the subsequent actions. *See* e. g., Friga v. State, Tex.Cr.App. 1973, 488 S.W.2d 430; Eagen v. State, Tex.Cr.App., 1970, 451 S.W.2d 514; Dickson v. State, Tex.Cr.App.1901, 64 S.W. 1043. So, there can be no presumption of prosecutorial failure on this issue.

residence." This is the most transparent of the State's speculations. In his instruction, the judge told the jury:

"Private residence," as used in the statute, means any building or room occupied and actually used at the time of the offense by any person or persons as a place of residence.[5]

Mrs. Crandall testified in her first trial "that she lived then at the time she testified at 1403 South Fitzhugh, and has lived there for forty (40) years; that on February 4, 1967, she was living there and she had lived and resided in a residence there in a house which had four (4) walls, a ceiling, floor, doors and windows . . . ;" and since Officer Mikel is stipulated to have testified that he "determined that screams were coming from *the house at 1403 South Fitzhugh*" (emphasis added), there is simply nothing to suggest that Mrs. Crandall was not in a residence and that the jury could have entertained real and rational doubts on this issue.

III.

This Court usually finds that its supply of ingenious semantic puzzles and fantastic hypotheticals emanate from the supplications of defendants. In keeping with deeply rooted American notions of justice and Constitutional edicts, we examine these applications to see if in fact the defendant was denied due process in his trial or whether the facts presented lever the probability that he engaged in criminal activity below the "reasonable doubt" marker. But fantastic hypotheticals introduced by the State to avoid the defense of double jeopardy are subject to a different standard. We must see if a "rational jury" could have based its decision on such factors, guided by the principle enunciated in Ashe, 397 U.S. at 444, 90 S.Ct. at 1194, 25 L.Ed.2d at 475, that "the rule of collateral estoppel in criminal cases is not to be applied with

5. The statute to which the judge referred is Vernon's Ann.Tex.Penal Code Art. 1391, which defines private residence as "any building or room occupied and actually used at the time of the offense by any person as a place of residence."

the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." By its injunction to apply collateral estoppel with "realism and rationality" we believe that the Supreme Court means that we should not allow a second trial, merely because technical requisites of the first charge are not involved in the second, where there is no evidence suggesting that those factors were even presented to the first jury for its active consideration. In the present case the alternative grounds hypothecated by the State are not of the sort which could move a rational jury, on its own, to acquit.

We are convinced that both juries stood their decisions on identity of assailant and intent to rape and did not engage in mental gymnastics so as to land on differing components. Double jeopardy is not a semanticist's paradise, but is to be determined by applying conventional idioms to the jurors' deliberations. There must be some legal necessity basic to one acquittal, not involved in the next trial, to justify a superseding conviction. We cannot permit initial trial deficiencies to be cured by subsequent trials. There are only four quarters to a football game. The exorcised double jeopardy is the constitutional eliminator of the might have beens. Puristic parallelism is not an absolute in the law of double jeopardy. Multitudinous criminal charges may spring from the same incident. The State's argument in the present case would nullify the doctrine of double jeopardy because any slight deviation in the indictment would give the State another Monday morning quarter.

It is therefore ordered that the petition of Billy Lee Johnson for a writ of habeas corpus is granted and that he be released from custody.



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# A P P E N D I X  "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 1973

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No. 73-3945

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D. C. Docket No. CA-3-5803

BILLY LEE JOHNSON,

Petitioner-Appellant,

versus

W. J. ESTELLE, Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States
District Court for the
Northern District of Texas

Before GOLDBERG, GODBOLD and MORGAN,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; the petition for writ of habeas corpus is granted and appellant is released from custody in accordance with the opinion of this Court.

January 9, 1975

Issued as Mandate:

# A P P E N D I X  "C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 Camp Street
New Orleans, La. 70130

February 3, 1975

Messrs. Robert C. Flowers, Asst. Atty. Gen.
Dunklin Sullivan, Asst. Atty. Gen.
P.O. Box 12548
Capitol Station
Austin Texas 78711

No. 73-3945 - Billy Lee Johnson vs.
W. J. Estelle, Director,
Texas Department of
Corrections

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MANDATE STAYED TO AND INCLUDING
March 5, 1975.

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

and

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By s/
Deputy Clerk

enc.
cc: Mr. Harry H. Walsh
Mr. Billy Lee Johnson
Mr. Gilbert Pena

# A P P E N D I X  "D"

Ex parte Billy Lee JOHNSON.
No. 44733.

Court of Criminal Appeals of Texas.
Nov. 2, 1971.

Original proceeding for postconviction relief. The facts were developed by Ed Gossett, Judge of the Criminal District Court No. 5. The Court of Criminal Appeals, Morrison, Jr., held that elements of crime of burglary of private residence at night with intent to commit rape were not the same as those of assault with intent to commit rape and acquittal of charge of burglary of private residence at night with intent to commit rape did not collaterally estop the state from trying defendant thereafter for assault with intent to commit rape arising out of the same transaction.

Application denied.

1. Judgment 720

In order to determine whether "collateral estoppel" is applicable, the court must define what first judgment determined by examination of the record of the prior trial and it must resolve how that determination bears on the second case.

2. Judgment 751

Elements of crime of burglary of private residence at night with intent to

commit rape were not the same as those of assault with intent to commit rape and acquittal of charge of burglary of private residence at night with intent to commit rape did not collaterally estop the state from trying defendant thereafter for assault with intent to commit rape arising out of the same transaction.

---

Roy E. Greenwood, Huntsville, for appellant.

Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

MORRISON, Judge.

This is an application for post conviction relief under Article 11.07, Vernon's Ann. C.C.P.

Appellant's conviction for assault with intent to rape was appealed to this Court and affirmed in Johnson v. State, 432 S.W.2d 98 (1968). His first two grounds of error in that appeal related to former jeopardy. Subsequent to our affirmance, the Supreme Court of the United States handed down its opinion in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and the concurring opinion of Presiding Judge Onion of this Court in Hutchings v. State, 466 S.W.2d 584 (1971), was written. Reliance is had upon both Ashe and Hutchings by appellant in this application.

Petitioner urges the doctrine of collateral estoppel. He contends that his acquittal on May 22, 1967, on a charge of burglary of a private residence at night with intent to commit rape precludes his being tried thereafter, on October 4, 1967, for assault with intent to commit rape where both of the charges arose out of the same transaction. Long prior to Ashe v. Swenson, supra, the Supreme Court of the United States, in Sealfon v. United States, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), pointed out that the question in a subsequent prosecution is whether the jury's verdict in the prior trial was a determination favorable to the petitioner of the facts essential to conviction in the latter case. This depends upon the facts adduced in each trial and the instructions under which the jury arrived at its verdict in the first trial.

[1] The United States Court of Appeals for the Second Circuit, in discussing Sealfon, said the application of the principle of collateral estoppel has two phases. First, it is necessary to define what the first judgment determined. As Sealfon explains, this is a process in which the Court must look not simply to the pleadings, but to the record of the prior trial as well.[1] Secondly, it is necessary to resolve how that determination bears on the second case. United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

In United States v. Lopez, 420 F.2d 313 (2d Cir. 1969), again discussing the Sealfon holding, the Court said:

> "* * * invocation of a prior judgment as collateral estoppel in a criminal trial requires the court to determine exactly what the earlier judgment decided."

As applied to the case at bar we must determine exactly what the prior jury in the burglary of a private residence at night with intent to commit rape decided. The case before us is not as simple as Ashe, because in that case the question of identity of petitioner as being one of the robbers was the sole issue decided in the prior trial which resulted in acquittal.[2]

[2] It is important to note that the elements of the crime of burglary of a private residence at night with intent to commit rape are not the same as those of assault with intent to commit rape. In reaching the verdict of acquittal the first jury could have found, among other things, that (1) the appellant entered the house without breaking; (2) that he entered by breaking with intent to commit theft but that the intent to commit rape was later formed; (3) that there was insufficient evidence that the site of the alleged crime was a private residence. If any of these formed a basis for the jury's finding, there would be no bar to a subsequent prosecution for assault with intent to rape.

With alternative ultimate facts outstanding, we cannot hold that the doctrine of collateral estoppel applies. The relief prayed for is denied.

1. In Ashe v. Swenson, supra, the Court said: "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of the prior proceedings taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" 397 U.S. at 444, 90 S.Ct. at 1194.

   We do not have the prior record before us but we do have stipulations.

2. Unlike in Ashe, the question of identity in this case is relatively negligible. The arresting officer arrived upon the scene, heard the prosecutrix scream, saw the appellant whom he clearly identified run from the back door. This officer then shot the defendant when he refused to stop and the arrest was made a short distance from the back door of the house. This would militate in favor of a finding that identity was not the question.